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ABSTRACT

The Convocation on Academic Freedom promotes discussion on academic freedom through theme-centered presentations. This talk examines the United States Supreme Court's interpretation of the religion clauses of the Constitution in the context of education. The focus is on the First Amendment's establishment clause, which enforces separation of church and state. With much of the adjudication centered around religion in public schools and aid to parochial schools, the emphasis here is on these two areas. Beginning with financial aid to church-related institutions, the discussion analyzes the first such case in 1947. The "Lemon" test is discussed next: the three-part test that the Court uses to determine whether public financial assistance or other kinds of state "aid" to religion violates the establishment clause. Cases that have been adjudicated with this test are reviewed, along with decisions in the 1980s that moved the Court away from the "Lemon" test to other types of approaches. The presentation then details how these approaches fuel the present debate in religion and education decisions. The role of religion in public schools and the future of religious practices in these schools are discussed last. (RJM)

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ED 424 613

The Intertwined Relationship Between

The Religion Clauses of the Constitution and American Education

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DELIVERED WEDNESDAY, OCTOBER 15, 1997

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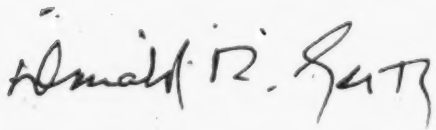
The President's Convocation on Academic Freedom

One of the most vital functions of a strong university is to develop and encourage public discourse about issues fundamental to public policy in the U.S. One of those issues is certainly academic freedom, which constantly challenges all Americans in many, many ways. The President's Convocation on Academic Freedom was established at California State University, Sacramento in 1996 to ensure that a forum exists for this important discussion. The presentations are subsequently published to create wider opportunities for policy debates. I am pleased to introduce the second presentation in this series, a very provocative and informative discussion of the intertwined relationship between the religion clauses of the Constitution and American education. Our speaker, Professor Jesse H. Choper, is one of the nation's most knowledgeable analysts of the Constitution's freedom of religion clauses. A past dean of the University of California, Berkeley School of Law, known as Boalt Hall, Prof. Choper now serves as the Earl Warren Professor of Public Law at Boalt Hall. This is a fitting role for this scholar, who was a law clerk with Chief Justice Earl Warren during the 1960-61 Court term. Prof. Choper and last year's Convocation speaker, Robert M. O'Neil, director of the Thomas Jefferson Center for the Protection of Free Expression at the University of Virginia, ensure that faculty and students at California State University, Sacramento, and readers of this series of publications, will hear from this country's most respected scholars on academic freedom.



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The Intertwined Relationship Between The Religion Clauses of the Constitution and American Education

BY JESSE H. CHOPER
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I am here today to talk about the United States Supreme Court's interpretation of the Religion Clauses of the Constitution in the context of education. Religion and the Constitution is a matter I have pursued since the very beginning of my entry into law teaching, and it has become an even more important topic since then.

Indeed, the opening words of the Bill of Rights of the United States Constitution provide that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

There are two Religion Clauses in the First Amendment: the "establishment" clause (sometimes called the "non-establishment" clause), and the "free exercise" clause. My principle focus will be on the establishment clause. Through it is enforced the unique separation of church and state that we have in this country.

"Two Great Drives Constantly in Motion. . ."

In the first modern decision by the Supreme Court on the establishment clause (1947), Justice Wiley Rutledge found "two great drives constantly in motion to abridge the complete division of religion and civil authority which our forefathers made."

The first of these drives, he continued, is to introduce religious education and observances into the public schools; the second drive is to obtain public funds for the aid and support of private religious schools.

The case in which Justice Rutledge announced these issues involved a municipality's payment of bus transportation for children who went to non-profit elementary and secondary schools, regardless of whether the schools were public or private. The case was the first concerning state aid to parochial schools — the second of Justice Rutledge's great drives.

The next two decisions — one coming in 1948 and the next coming in 1952 — both involved systems of "release time" in which the public schools would close down early one hour a week, and those children whose parents signed permission cards to go to religion classes could do so. The others stayed behind in study halls.

There evolved the first "drive," as Justice Rutledge described it, and that is religion in the public schools. Over the next half century, between 1947 and the current day, these two drives — religion in the public schools and aid to parochial schools — have comprised the major areas of Supreme Court adjudication defining the separation of church and state and religious freedom in the United States. They continue to do so.

Therefore, it is a review of these two subjects in respect to America's educational system that best reveals the state of the law on the Religion Clauses of the Constitution. I discuss these two great drives in order to show the intertwined relationship between the Religion Clauses of the Constitution and American education.

Financial Aid to Parochial Schools

I begin with financial aid to church-related institutions — mainly aid to parochial schools. That very first case back in 1947 involving such aid (the municipality's decision to pay for the bus transportation of children to go to all non-profit schools, including parochial schools) sharply posed the great difficulty that would confront the Supreme Court in interpreting the establishment clause. Should the bus transportation be held to be a violation of the constitutional separation of church and state in the U.S.?

The majority of the Supreme Court, in a 5-4 decision, (one of the five later changed his mind, although that did not change the result in that case), held that there was no violation of the separation of church and state. The purpose for paying for the bus transportation of these children was secular, in that there was a "public" — that is to say "non-religious" — purpose, and that was to protect the school children from the hazards of traffic. This was a rural New Jersey community, which fits the image of

children trudging through the snow in the dark to go to school. The Court emphasized that no money went to the schools; the municipality was simply giving them free bus tickets. The Court also warned (and this is a continuing problem to this day), that it had to be very careful not to require discrimination against persons because of their religious beliefs to ensure the separation of church and state. I think that all this was true.

The dissent argued as follows in finding that this was a violation: the public financial assistance is being used to help children to get to the very schools to which they go specifically in order to get religious training. I think that was also true. I don't think any objective person would deny that this is largely, if not overwhelmingly, the reason why parents send their children to church-related schools. So the conflicting points and policies were posed.

Interestingly, the next major decision on the subject took place more than 20 years later in 1971. The case involved two states paying a small percentage of the salaries of parochial school teachers who taught secular subjects such as math, foreign languages, physics, physical education, and the like. There was no funding for religious teaching at all. Is that a big step beyond bus transportation? The states were not actually paying all parochial school teachers, but only paying a fee to teachers of secular subjects.

The "Lemon" Test

In 1971, the Supreme Court adopted a three-part test for determining whether public financial assistance or other kinds of state "aid" to religion violates the establishment clause. The test was known as the "Lemon" test (deriving its name from the title of the case rather than from some qualitative appraisal of how well it has worked out). The Court said in order to pass muster under the establishment clause, the government program had to have a secular purpose; its primary effect cannot advance religion; and there can be no excessive entanglement resulting between government and religion.

How did this payment of salaries for teachers of secular subjects in parochial schools work out? The Court overwhelmingly found (with only one dissent) that there *was* a violation of the establishment clause in paying these salaries to the teachers.

It reasoned as follows: there was a secular purpose; the purpose was to improve the quality of secular education the children who attend parochial schools receive. It is clear that the public has a substantial non-religious interest in all of our children's knowledge of math, foreign languages, and so on.

But the Court went on to make a very important legal presumption, and that was that elementary and secondary schools run by churches are permeated with religion. *All* of the school is permeated with religion. Therefore, even if the money went for secular purposes, there would be either a primary effect that advanced religion (since the courses in the schools were permeated with religion), or you would have to have monitoring or surveillance by state officials to assure that the teachers who received these supplements from the state did not engage in any religious indoctrination. That would produce excessive entanglement between government and religion.

While most aid to elementary and secondary schools was found in violation of the separation of church and state for a number of years, most aid to church-related colleges and universities was upheld.

The Supreme Court, if you will, hung the parochial schools on the horns of a dilemma. If you didn't have monitoring, then the effect would be to advance religion. If you did something that prevented advancing religion in these religiously permeated schools, you would have excessive entanglement between church and state.

Note, however, that in the same set of cases, the Court adopted an opposite presumption for higher education. The Court reasoned: whereas elementary and secondary schools are pervasively sectarian or permeated with religion, that is not true of colleges and universities. As a consequence, while most aid to elementary and secondary schools was found in violation of the separation of church and state for a number of years, most aid to church-related colleges and universities was upheld, so long as it could be shown that the funds would not be used for specifically religious purposes. Colleges and universities are not presumed to be pervasively sectarian. They carry with them, according to the Supreme Court's presumption, the influence of academic freedom and the like.

Subsequent decisions during the 1970s and the 1980s produced what I can only describe as a conceptual disaster area. For example, bus transportation to parochial schools, as we've already heard, was upheld. But paying for field trip transportation from parochial schools to cultural and scientific centers such as museums and art galleries was held unconstitutional. Lending parochial

students state-approved secular textbooks — the same math or science books used in the public schools — was okay. But lending parochial students instructional materials such as maps, films, movie projectors, or lab equipment was held not okay. It was held to be a violation whether they were loaned to the students or directly to the parochial schools.

Certain auxiliary services, such as remedial writing and math courses or guidance counseling, if delivered on the premises of a parochial school — even by public school teachers who would come in just to give these courses — was held unconstitutional. But if the same services were delivered off the premises of the parochial school by the same teachers, that was all right, even if the off-premises site was a mobile unit which was pulled up to the curb of the parochial school.

On the issue of administering and grading achievement tests that were required by the state, the Court found that if parochial school teachers prepared the tests, then it was unconstitutional for the state to pay for preparing and grading the test. But if the state prepared the tests, it was okay to pay for their being administered and graded by the parochial school teachers.

Tax credits for parents who sent their children to non-public schools including parochial schools (a case that is 25 years old, but an idea whose time is still around) was held invalid, but tax deductions for any amount that a parent paid for tuition, transportation, textbooks, and instructional equipment was okay for parents of children enrolled in all non-profit schools, not just non-public schools.

Notice that there are very few tuition, transportation, textbook, instructional material and equipment expenses that you have if you send your child to a public school. The fact was that more than 90 percent of the program benefits went to children at church-related schools, even though the program provided for assistance no matter where the kids went to school (as long as it was a non-profit school). The Court's "equal benefits for all" approach is very important, as we shall see, in the Court's present thinking with respect to this question.

This "equal benefits for all" analysis resulted in a decision in the mid-1980s that continues to be highly influential. The state of Washington gave vocational assistance grants to persons with visual handicaps — assistance designed to help them get into a particular occupation. Students who received the vocational assistance grants transferred the grants to the school they attended. The particular recipient in this case was blind, and was studying at a Christian college to be a pastor or missionary.

The Court unanimously held that this did not violate the Constitution — not because he was not studying to accomplish a religious purpose, but because there was no impermissible primary effect of a program that gives to all in a particular group, no matter where they go to school. All visually handicapped students could attend school, no matter what they studied — to become salespersons, pastors, teachers, or what have you.

The Court reasoned that the aid to religion results not from the government's choice but from the private choice of the particular recipients. Of course, if you think about that for a moment, wouldn't it be the same thing if you sent the money directly to the parochial schools for the number of visually handicapped children who attended? Their enrollment at these particular schools also was the product of private choice, but that's another story.

A Trend Away from the "Lemon" Test

These last-mentioned cases from the mid-80s marked a trend away from the "Lemon" test (which looked to purpose and effect), and toward several competing approaches.

The first is the endorsement approach, developed originally by Justice Sandra Day O'Connor in 1984. She said purpose and effect are not enough. An establishment clause violation should depend on whether a reasonable observer would perceive the challenged government action as an endorsement of religion.

I should note that the endorsement approach would appear to be what the Court is using today.

Another approach, directly competing with the endorsement approach, was articulated by Justice Anthony Kennedy in 1989. His approach — called the "coercion" approach — is one that I more or less have supported since 1963. Justice Kennedy's position is that you don't find a violation of the separation of church and state unless you find some religious coercion in respect to the individual.

I should say that "coercion" probably is an unfortunate title. "Coercion" is defined by Justice Kennedy (and by me) as something much broader than the normal, intuitive definition of that term. Justice Kennedy defined it as "some form of compulsion." It doesn't have to be "direct" compulsion, and I will illustrate this in a moment. He also included within the definition of coercion the government's payment of "a significant amount of tax funds" to religion. And he added that coercion may be found by government exhortation — there is quite a difference, intuitively, between coercion and an exhortation — that is so strong that it "amounts to proselytization" on behalf of religion. I will tell you that Justice Kennedy's approach has a number of adherents on the Supreme Court today, but less than a majority.

The third approach is the theme of neutrality (or equality) that I referred to earlier. It has great appeal to the innate value Americans place on equality, wholly apart from religion and the state. Some people think that the separation of church and state means the government must be neutral. A persistent theme, neutrality has never been adopted as the test, but is always there in the background influencing the tests that have been adopted. It was never strongly urged as a test, as such, until very recently, mainly by Justice Antonin Scalia. Justice Scalia is a very outspoken member of the current Supreme Court and one of the most highly visible. I think it is fair to say that regardless of ideology, he also is one of the most articulate and intellectually influential justices on the Court.

Interestingly, a key background decision involving the theme of neutrality came from higher education in 1981. It involved the University of Missouri at Kansas City (UMKC), a public university like California State University, Sacramento. UMKC had created a public forum where student activities, student rallies and student exercises could all take place. UMKC permitted all student organizations to use the facilities for a variety of purposes, except for religious worship and discussion. The question was, should it be a violation of the separation of church and state for a school to give over its facilities to be used for "religious worship and discussion"?

The Court (again, nearly unanimously) held that using the school's facilities in that way was not a violation of the separation of church and state. Indeed, the Court said that it would be a violation of individual freedom to exclude groups because of their particular beliefs or the content of what they had to say. Notice the neutrality theme.

The Court said the First Amendment's free speech clause (it could have just as easily said the First Amendment's free exercise of religion clause) bars denial of public benefits to people because of the content of what they say, or their particular beliefs. The Court further reasoned that allowing students to use the facilities for religious worship or discussion does not violate the establishment clause. Even though there's an incidental benefit to religion, there is no primary effect that advances religion. There is no government imprimatur of religion. Why? Because of the broad spectrum of beneficiaries. The school is not approving or placing its imprimatur on anyone. It is equal aid for all.

The Present Controversy

These three competing approaches — endorsement, coercion, and neutrality —have played a key role in two recent cases, and they reveal the nature of the present controversy.

In 1993, less than four years ago, the Court returned to the issue of aid for parochial schools for the first time in seven years. The issue was, does the state's providing a sign language interpreter for a deaf student in a parochial high school violate the separation of church and state?

In 1993, less than four years ago, the Court returned to the issue of aid for parochial schools for the first time in seven years.

This particular state program provided sign language interpreters to students who were hearing impaired. The program extended to all schools, including parochial schools. The deaf student in question had transferred from a public school (where he had been provided with a sign language interpreter) to a parochial school. He wanted to take the sign language interpreter with him. Does the state's program violate the separation of church and state?

The Court, closely split, said no, there is no violation of the separation of church and state under these circumstances. First, the aid is part of a general program — that is, you get the sign language interpreter no matter what school you go to. Second, no funds are paid to the parochial school, but rather to the public employee who is the sign language interpreter. Third, the benefit to the parochial school is a result of the parents' choice — not the state's — to send their children to a parochial school. Finally, the sign language interpreter doesn't teach any religion but rather just interprets. All this is true.

The dissent argued that what we have here is a public employee directly participating in religious indoctrination. This is also true, isn't it? He interpreted everything, including the religious indoctrination programs in the parochial school. Never before, the dissenters complained, has the Court upheld any form of direct aid of this sort.

Who is right? I'll try to explain in a parable. In eastern Europe until close to the middle of this century, the Jews were often forced to live in segregated communities called ghettos (those were the original ghettos). The rabbi was not only the religious leader, but he was the principal dispute resolver in the ghetto, as well.

A new rabbi was appointed for a particular ghetto and the first set of cases came up. It was decision day. The

whole community turned out; they wanted to see what kind of decision maker the new rabbi was. The first case was a marital dispute. The wife came forward and said, "This husband of mine is lazy, he doesn't provide for us, I have to struggle, the children aren't well-fed, none of us are well-clothed; it's just terrible." The rabbi stroked his beard and said, "Yes, you're right." The husband then came forward and said, "This wife of mine is absolutely terrible. The house looks like a pigpen, the children aren't washed, I never have my meals prepared no matter what I bring home to eat." The rabbi listened, continued to stroke his beard, and said, "You're right."

After a brief silence, someone in the back of the audience exclaimed, "Rabbi, first you heard the wife tell one story, and you said she's right. Then you heard the husband, who told a completely different story, and you said he's right. They both can't be right." The rabbi responded, "You're right, too."

That, it seems to me, describes the difficulty with confusing doctrine in the Supreme Court. You can pull on any strand of that doctrine to justify a particular result as being "right."

Two years later, in 1995, the issue was as follows: if the University of Virginia funds student newspapers generally, may it include one that proselytizes a distinctly Christian viewpoint? The record showed that the newspaper in question strongly and unquestionably advocated a religious perspective. The case posed a conflict between two basic religion clause principles. On the one hand, government may not fund religious activities. If you fund this newspaper, isn't that a religious activity? The other principle is, yes, but the government must be neutral between religion and non-religion, and if you fund the newspapers for sports enthusiasts, for young Republicans, for the boating club, can you exclude the religious newspaper?

Neutrality won, 5-4. The First Amendment's free speech clause, the majority held, would be violated if newspapers were denied money because of the viewpoint they expressed, and that's exactly what the University of Virginia wanted to do. It would not give financial support for a religious proselytizing viewpoint. The Court reasoned that the establishment clause was not a bar to neutral aid.

The dissent argued that this was the first decision to allow funding of core religious activities. The other financial aid cases were different, according to the minority. Those decisions upheld funding for secular activities — such as bus transportation, secular textbooks, or science labs. The University of Missouri at Kansas City case didn't involve any funding at all, but simply the use of the public facilities, which resulted in only a *de minimus* benefit (that's a legal term).

Well, what about this case? It's not easy. I would like to stress that even the majority opinion was very narrow. The five Justices in the majority said, first of all, that the payments made by the university went directly to the printing companies, not to the religious organizations. That's the way the check was drawn. Well, I'll tell you, no first-year law student could get away with that kind of reasoning. But these were not first-year law students; this was the United States Supreme Court. As a famous Supreme Court justice once said, "We are not final because we are infallible. We're infallible because we are final."

In 1995, the issue was as follows: if the University of Virginia funds student newspapers generally, may it include one that proselytizes a distinctly Christian viewpoint?

The majority then made a second distinction. They said it was not simply a payment to a religious institution, but for a newspaper. This was a stronger point, I think. If the Court were to rule that the university could not fund a religious newspaper, the Court suggested that you'd have to have some university official going through all the student newspapers trying to figure out whether they were religious or not, and that smacks of official censorship and so forth — not a very good thing. I think that's a fair point, but that makes it a very limited decision. It is confined to funding newspapers and not funding other sorts of activities.

Finally, Justice O'Connor, who was one of the five in the majority in this case, wrote a separate opinion. She said this was a very peculiar case. The funds used to pay for the newspapers came from student fees, specifically a student activities fund. Students may have a constitutional right to opt out, she said; they may have a right to say that they can't be compelled to support someone else's religion and that, therefore, they have a right to have a certain percentage of their fee refunded. This is a greatly limiting factor. No one has the right to opt out of general taxes, which is the funding source for most things.

The case is a very limited decision, because all of these are critical limiting factors. Otherwise the neutrality principle would permit all forms of aid to religion as long as it was part of a larger program. For example, let's say the government wanted to pay for the insignia of all voluntary organizations. So if you belong to the United Way Fund, the state pays for its insignia, or if you belong

to the National Organization of Women, the state funds that insignia. If it were a neutral program, government could fund crucifixes and stars of David as well. Would that be unconstitutional? Would it be unconstitutional to fund all the others and exclude them? That question poses the great tension in this particular area.

Religion in Public Schools

I'd like to spend the remainder of my talk on religion in the public schools — the second great drive that Justice Rutledge found to be threatening the division of church and state in the U.S.

This area has been that of strictest separation since both the 1950s and the 1960s and up through the mid-80s. In this area, the Court has held a whole series of programs in the public schools invalid, for example, on-premises release time (where the kids go to the religious classes on the premises of the parochial schools). There are many famous cases: The Lord's Prayer and Bible reading are unconstitutional in the public schools. A law barring the teaching of evolution in the public schools was held to have a religious purpose, and therefore was held unconstitutional. Kentucky passed a law requiring the posting of the Ten Commandments in classrooms, saying that the Commandments were historically the foundation of our law. The Court said, come on — this is religious. Having a minute of silence for a specific religious purpose such as meditation or voluntary prayer was held unconstitutional, and about 10 years ago, the required teaching of creation science, along with evolution, was held also be a violation of the separation of church and state.

These cases were all decided under the "Lemon" test. The Court's rationale was very simple. The Court said the purpose of all of these programs is religious, and that's it. Under the "Lemon" test, if the purpose is religious, it is unconstitutional and that's the end of it. But three major decisions of this decade (two of which found a violation, but one of which did not) reflect a different approach. These decisions reflect an approach emphasizing endorsement, coercion, and neutrality. It's these decisions that depict the current situation.

The first case was in 1993 involving a little New York village, north of New York City, which was a religious enclave for a group of orthodox Jewish people called Satmar Hasidim. It's a highly orthodox Jewish group that has an unassimilated culture with respect to their language, their dress, segregation of the sexes in education and so forth, and they shun contact with the outside world. All the children in this village (called Village of Kiryas Joel, a Hebrew term) went to a private parochial school, so there was no problem of church and state in that respect. The school was a religiously permeated school (there was no question about that) but it was privately funded.

However, handicapped students — for example, those who were deaf, retarded, or had physical or mental disorders — had special funds available from the state. They received special education by public school teachers at an annex to the parochial school.

But, since this was parochial school property, the Court had held that the classes were invalid under decisions in the 1970s. In fact, the rule has since changed, but it hadn't changed yet in 1993.

The Satmar Hasidim still wanted to get the benefit of the aid for their children with handicaps, so they sent them to a public school outside the village. However, as the record showed, the students suffered panic, fear, and trauma outside their own community because they were a culturally unassimilated group with very distinctive kinds of dress and so forth. The long and the short of it is, it didn't work.

So the New York Legislature then passed a law which made the Village of Kiryas Joel (remember, it was exclusively made up of these people of the same religion) a separate school district. The new school district ran only one public school, and that was for Satmar Hasidim children with handicaps. The village was very careful that only secular education was offered in that school. Indeed, while a number of the school teachers, the supervisor, and the principal were Jewish, they were not members of the Satmar Hasidim sect. The arrangements were made in a very careful way with the advice of some very careful lawyers. It was not an accidental matter.

The Court, in a 6-3 decision, held that this was unconstitutional. The reason was based on an aspect of the neutrality rule: the universally acknowledged principle that government may not deliberately prefer one religion over another. The majority of the Court felt that this separate school district was only created for this one particular religious sect. Would New York create another one for some other religious sect? We don't know, but they only created it for one sect, and therefore, it was unconstitutional. I should say this was a very unusual factual situation, and it is a case that will have very limited impact. But it nonetheless shows the thrust of the neutrality principle. What made the New York law bad was that it was non-neutral. It singled out one religion for special treatment.

The most significant decision came several years earlier. It involved an act of Congress called the Equal Access Act of 1984. It's a mouthful to describe, but it's easily understood. It provides that any public secondary school that permits student groups to meet on school

premises during non-instructional time cannot deny equal access to religious groups.

In the case, a Christian group wanted to use school premises for praying and teaching religion. The question was, does that violate the establishment clause? Can the public school permit its premises to be used for these core religious activities? The Court, in a near unanimous opinion, said that is not unconstitutional because all groups are treated equally or neutrally.

The Future

The most important question for the future is: to what extent does this neutrality theme affect religious practices in the public schools?

The most important question for the future is: to what extent does this neutrality theme affect religious practices in the public schools?

An important answer comes in one case decided in 1993 which many of you read about, I'm sure. It involved an invocation and benediction prayer by a member of the clergy at the annual graduation of a junior high school. Did that violate the Constitution? Seemingly, the school did not prefer one religion over another. A minister one year, a priest the next year — they were equal. Indeed, they might have even picked someone who was non-religious, so it seemed to be a neutral-like program in that respect.

The Court held 5-4 that this was a violation of the separation of church and state. It was a very unusual opinion for two reasons. First, it joined the two competing theories. Justice Kennedy wrote the opinion for the Court, and he found that the graduation was "one of life's most significant occasions" where "subtle, coercive pressures" exist to participate in the invocation or benediction by standing and/or remaining silent. The four Justices who joined him were usually his opponents. They were the people who were endorsement test followers. Endorsement is enough; you don't need coercion. He found coercion here.

Justice O'Connor, joined by two other Justices who are still on the Supreme Court, wrote separately to emphasize that maybe there was coercion here, but there was endorsement, too, when they sent a member of the clergy up to participate in this public occasion. And endorsement was enough to find a violation of the establishment clause. This is the view that the two newest members of the Court, Justices Ruth Bader Ginsburg and Stephen Breyer, also seem to support. Therefore, it appears, although it has not been formally (if you'll excuse the pun) endorsed by the Supreme Court, that this is the current test. Second, what does it show us? It shows us that even though you have a neutral program, if it's coercive or if it is perceived as endorsing religion, it's going to be held to be a violation of the separation of church and state.

What is the future of other programs and activities involving religion in the public schools? How about release time on premises? (That's where one day a week the school closes down an hour early and kids whose parents have signed request cards go to religious classes, held on school premises.) Any religion can send its teacher to the schools. The kids who don't want to go stay in a study room. They don't close the school; it's simply release time from classes. Since 1948 that's been held to be a violation of the establishment clause.

How about now? I think as follows: if the school provided a range of alternatives to the religious classes (such as cooking, archery, ice skating, and so forth and so on), I think they could include the religious classes. Wouldn't that look very much like the equal access case in which you permit all student groups to use public school premises during non-instructional time?

How about posting the Ten Commandments on the walls of every classroom? Kentucky required that just a dozen years ago, saying that the Commandments are the source of all Anglo-American law. I think that would probably be okay too, if you gave equal access to other groups — if you posted not only the Ten Commandments but also Lincoln's *Gettysburg Address*, and so forth. That's again equal access. I would say that probably that would not be found to be an endorsement, nor would anyone be coerced. Indeed, the Court didn't find any coercion the last time around when it struck down the posting of the Ten Commandments. What it found instead was simply that the purpose was religious. Maybe if you put enough of other kinds of messages up there the purpose would not be found to be religious.

How about teaching creation science in the schools where evolution is taught? The Court held that was unconstitutional. The Justices held it unconstitutional because, quite accurately, the purpose was to introduce this counter-Darwinian theory which emanated in religious belief. The dissenters said the schools weren't teaching religion — they were just teaching whatever science there was to support the creation science notion. I don't know

about that. Does it coerce anyone to do anything? I doubt it. Does it endorse religion? I leave you with that question, but that's the approach the Court is going to use.

It's clear to me that even though a moment of silence in the schools was struck down by the Supreme Court about 15 years ago, it would be upheld today — if properly enacted, cleaned up and it was made clear that the moment of silence could be put to any use at all (meditation, prayer, or reflection, or what have you).

The big question is, how about oral prayer, which the Court dealt with in 1962 and 1963, now almost 35 years ago? Oral prayer is one of the most controversial issues that the Supreme Court has ever addressed — maybe not as controversial as the racial segregation cases, but pretty significant, nonetheless. Polls show that large numbers of people in the United States continue to want prayer in the public schools. I said that the Court would uphold a moment for silent prayer, among other things. Could you have oral prayer?

It's fairly clear to me that the three most conservative Justices of the Court — Chief Justice William Rehnquist, Justice Scalia, and Justice Clarence Thomas would uphold all "voluntary" non-preferential programs. You couldn't read the King James version of the Bible everyday, but if you shifted it around, if you could read the Koran if you had Muslim students, or the works of Buddha or what have you, I think those three Justices would uphold it. But, I am fairly confident that the other six would adhere to the existing results. That is, they would find (especially after the invocation/benediction-at-graduation case) that this is either an endorsement of religion (even though you have all religions represented) or (although there is no direct coercion since they are voluntary programs) that there is nonetheless a subtle coercion for children who would be permitted to leave the room during these programs. I think the court majority would find that in itself is coercive, putting peer group pressure on the children to participate. (There are all kinds of sociological studies to support that position.)

The bottom line is that there will be some modifications made, some "reduction" of the separation of church and state, if you will, some movement toward accommodation, but no major changes.

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